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8 **UNITED STATES DISTRICT COURT**
9 **DISTRICT OF ALASKA**
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12 **VIVIAN DIETZ-CLARK,**

13 **Plaintiff,**

14 **vs.**

15 **HDR, INC.; HDR LTD INC. PLAN; and**
16 **UNITED OF OMAHA LIFE**
17 **INSURANCE CO.,**

18 **Defendants.**
19

3:15-CV-00035 JWS

ORDER AND OPINION

[Re: Motion at docket 11]

20 **I. MOTION PRESENTED**

21 At docket 11, Defendants HDR, Inc. (“HDR”), HDR LTD Inc. Plan (“LTD Plan”),
22 and United of Omaha Life Insurance Co. (“United of Omaha”; collectively, “Defendants”)
23 filed a motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil
24 Procedure. Plaintiff Vivian Dietz-Clark (“Dietz-Clark” or “Plaintiff”) responds at
25 docket 12. Defendants reply at docket 17. Oral argument was not requested and
26 would not assist the court.

27 **II. BACKGROUND**

28 Dietz-Clark worked as a right-of-way specialist for HDR. She alleges that
beginning on July 30, 2012, she suffered from various medical conditions that affected

1 her ability to work. She underwent surgery for a pacemaker on August 12, 2012.
2 Afterwards, she had difficulty keeping up with her work. She received short-term
3 disability benefits for a few months, and then in late October of 2012, she applied for
4 long-term disability benefits with United of Omaha under HDR's long-term disability
5 plan, the LTD Plan. The LTD Plan is an employee benefits plan governed by the
6 Employee Retirement Income Security Act of 1974 ("ERISA").¹ By letter dated
7 February 28, 2013, United of Omaha denied her claim for long-term disability benefits
8 and informed her that she had 180 days to appeal the decision. She did not file an
9 appeal because, according to the complaint, she had hoped to rehabilitate herself.

10 On January 16, 2015, Dietz-Clark, through her attorney, requested that United of
11 Omaha reopen her claim. She conceded that she had not appealed the denial within
12 180 days, but argued that the missed deadline was not fatal to her request because of
13 Alaska's "notice-prejudice rule," which is not preempted by ERISA based on *UNUM Life*
14 *Insurance Co. v. Ward*.² United of Omaha declined to reopen the claim. This lawsuit
15 followed.

16 **III. STANDARD OF REVIEW**

17 Rule 12(b)(6) tests the legal sufficiency of a plaintiff's claims. In reviewing such
18 a motion, "[a]ll allegations of material fact in the complaint are taken as true and
19 construed in the light most favorable to the nonmoving party."³ To be assumed true,
20 the allegations "may not simply recite the elements of a cause of action, but must
21 contain sufficient allegations of underlying facts to give fair notice and to enable the
22 opposing party to defend itself effectively."⁴ Dismissal for failure to state a claim can be
23 based on either "the lack of a cognizable legal theory or the absence of sufficient facts
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25 ¹29 U.S.C. §§ 1001 *et seq.*

26 ²526 U.S. 358 (1999).

27 ³*Vignolo v. Miller*, 120 F.3d 1075, 1077 (9th Cir. 1997).

28 ⁴*Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011).

1 alleged under a cognizable legal theory.”⁵ “Conclusory allegations of law . . . are
2 insufficient to defeat a motion to dismiss.”⁶

3 To avoid dismissal, a plaintiff must plead facts sufficient to “state a claim to relief
4 that is plausible on its face.”⁷ “A claim has facial plausibility when the plaintiff pleads
5 factual content that allows the court to draw the reasonable inference that the
6 defendant is liable for the misconduct alleged.”⁸ “The plausibility standard is not akin to
7 a ‘probability requirement,’ but it asks for more than a sheer possibility that a defendant
8 has acted unlawfully.”⁹ “Where a complaint pleads facts that are ‘merely consistent
9 with’ a defendant’s liability, it ‘stops short of the line between possibility and plausibility
10 of entitlement to relief.’”¹⁰ “In sum, for a complaint to survive a motion to dismiss, the
11 non-conclusory ‘factual content,’ and reasonable inferences from that content, must be
12 plausibly suggestive of a claim entitling the plaintiff to relief.”¹¹

13 **IV. DISCUSSION**

14 Defendants argue that Plaintiff’s lawsuit should be dismissed because of her
15 failure to exhaust the LTD Plan’s administrative remedies. Indeed, as a general rule an
16 ERISA “claimant must avail himself or herself of a plan’s own internal review
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20 ⁵*Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990).

21 ⁶*Lee v. City of Los Angeles*, 250 F.3d 668, 679 (9th Cir. 2001).

22 ⁷*Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550
23 U.S. 544, 570 (2007)).

24 ⁸*Id.*

25 ⁹*Id.* (citing *Twombly*, 550 U.S. at 556).

26 ¹⁰*Id.* (quoting *Twombly*, 550 U.S. at 557).

27 ¹¹*Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009); *see also Starr*, 652 F.3d
28 at 1216.

1 procedures before bringing suit in federal court.”¹² An ERISA claimant’s failure to file a
2 timely administrative appeal from a denial of benefits constitutes a failure to exhaust
3 administrative remedies.¹³ Here, in accordance with ERISA regulations, Plaintiff had
4 180 days from the denial of her claim in which to file an appeal.¹⁴ It is undisputed that
5 she failed to do so, and thus, her 2015 request to appeal her claim was untimely.
6 However, Plaintiff argues that her appeal should not be considered late or at least
7 should be excused because Alaska’s “notice-prejudice rule” applies to override the
8 contractual time limit set forth in the LTD Plan unless United of Omaha can
9 demonstrate prejudice as a result of her delay. Thus, she argues that her attempted
10 appeal in 2015, which United of Omaha unduly refused to consider, sufficiently
11 exhausted her administrative remedies.

12 ERISA supercedes any state laws relating to employee benefit plans,¹⁵ but it
13 does not preempt state laws that regulate the insurance industry.¹⁶ In *UNUM*, the
14 Supreme Court held that California’s notice-prejudice rule—under which an insurer
15 cannot deny a claim based on an untimely notice or proof of claim unless the insurer
16 shows it suffered actual prejudice from the delay—was in fact a law that regulated
17 insurance and thus escaped preemption under ERISA. The Court noted that the
18 California notice-prejudice rule, established through case law, “effectively creates a
19 mandatory contract term that requires the insurer to prove prejudice before enforcing a
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23 ¹²*Diaz v. United Agric. Emp. Welfare Benefit Plan and Trust*, 50 F.3d 1478, 1483 (9th
24 Cir. 1995).

25 ¹³*See Edwards v. Briggs & Stratton Ret. Plan*, 639 F.3d 355, 362 (7th Cir. 2011).

26 ¹⁴29 C.F.R. § 2560.503-1(h)(3)(I); Complaint, Doc. 1 at p. 4, ¶ 17.

27 ¹⁵29 U.S.C. § 1144(a).

28 ¹⁶29 U.S.C. § 1144(b)(2)(A).

1 timeliness-of-claim provision.”¹⁷ It then stressed that “state laws mandating insurance
2 contract terms are saved from preemption [under ERISA].”¹⁸

3 Alaska has a notice-prejudice rule that has developed through case law.
4 Alaska’s notice-prejudice rule, like California’s rule, has been applied to extend
5 contractual notice of claim deadlines absent a showing of prejudice by an insurer.¹⁹
6 Alaska has also applied the notice-prejudice rule to insurance policy provisions other
7 than claim notice deadlines. In *Estes v. Alaska Insurance Guaranty Association*,²⁰ the
8 Alaska Supreme Court held that the notice-prejudice rule applied to provisions placing
9 time limits on the commencement of lawsuits that are shorter than the statute of
10 limitations. That is, the court held that a contractual modification of the statute of
11 limitations is only enforced upon a showing of prejudice. Based on *Estes* then, in order
12 for an insurance company to base its defense on the insured’s failure to bring suit in a
13 timely manner under the contract, but within the statute of limitations, it must show that
14 the delay caused prejudice that the time limit sought to avoid.²¹ The notice-prejudice
15 rule also applies to an insurer’s attempt to use the breach of a cooperation clause in an
16 insurance contract as a defense to a lawsuit. The insurer must show that the breach of
17 the cooperation clause caused it prejudice.²²

18 Plaintiff argues that because Alaska’s notice-prejudice rule has been applied
19 beyond just notice of claim time limitations and particularly to commencement of lawsuit
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21 ¹⁷*UNUM*, 526 U.S. at 374 (internal quotation marks omitted).

22 ¹⁸*Id.* at 375.

23 ¹⁹*See Weaver Bros., Inc. v. Chappel*, 684 P.2d 123 (Alaska 1984).

24 ²⁰774 P.2d 1315 (Alaska 1989).

25 ²¹*Id.* at 1317-18.

26 ²²*Id.* at 1318; *see also Allstate Ins. Co. v. Herron*, 634 F.3d 1101 (9th Cir. 2011)
27 (stressing that under Alaska law an insured needs to be prejudiced before relying on a breach
28 of a cooperation clause to avoid liability).

1 time limitations, it also applies to any time limitations in insurance policies. Thus, she
2 argues, Alaska’s law would apply to this ERISA case pursuant to *UNUM*. The court
3 disagrees that Alaska’s notice-prejudice rule is as broad as Plaintiff asserts. While
4 Alaska has an extended notice-prejudice rule that has been applied to commencement
5 of suit time limitations, the rule has only been applied when the insurance policy
6 shortens the applicable statute of limitations. It has not been extended so far as to
7 cover contractual administrative appeal deadlines, particularly in ERISA cases where
8 the appeal deadline is required under federal regulation to be no less than 180 days, as
9 it was here. That is, the Alaska cases “simply do not support application of the notice-
10 prejudice rule to a deadline of a post-denial appeals process that is mandated by
11 federal regulation.”²³

12 Plaintiff argues that even if the cases are distinguishable, this court must predict
13 how the Alaska Supreme Court would apply the notice-prejudice rule to the situation
14 presented here. She then argues that the Alaska Supreme Court would likely extend
15 the notice-prejudice rule to an appeal deadline, because it is a deadline that was not
16 actually bargained for but rather imposed by the insurer. As noted by Defendants, the
17 Alaska cases developing the notice-prejudice rule involved individual insurance
18 contracts, not ERISA group plans. The Alaska cases stressed the fact that such
19 individual contracts are not typically bargained for but rather are unilaterally imposed by
20 the insurer, and the cases stressed the importance of the notice-prejudice rule in
21 protecting reasonable consumer expectations in relation to an individual insurance
22 policy. ERISA plans, however, are different. The Supreme Court indicated in
23 *Heimeshoff v. Hartford Life & Accident Insurance Co.*,²⁴ that ERISA plans should be
24 enforced as written because “employers have large leeway to design disability and
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27 ²³Doc. 17 at p. 3.

28 ²⁴134 S.Ct. 604 (2013).

1 other welfare plans as they see fit.”²⁵ That is, the employer actually bargains for the
2 plan’s terms. Thus, the rationale behind the Alaska Supreme Court’s notice-prejudice
3 rule is inapplicable.²⁶ Also, there has been no contractual shortening of any typical
4 deadline here. As noted above, pursuant to federal regulations, the appeal deadline
5 cannot be shorter than 180 days, and therefore, the appeal deadline provided in the
6 LTD Plan met any reasonable expectation of the employee.

7 That said, the court need not predict whether the state notice-prejudice rule
8 would apply here. As noted by Defendants, in ERISA cases “[t]he federal court is not
9 tasked with predicting how a state court might create insurance common law.”²⁷ The
10 ERISA savings clause only exempts existing state laws that regulate insurance from
11 preemption, not hypothetical ones. In ERISA cases, the court is required to rely on
12 federal common law.²⁸ As noted by the Ninth Circuit, “[t]here is no . . . federal case that
13 has applied a notice-prejudice rule outside the initial review context. To extend the
14 notice-prejudice rule to ERISA appeals would extend the rule substantially beyond its
15 previous uses.”²⁹ The court is “not inclined to make such a significant and
16 unprecedented extension of the rule.”³⁰

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18 ²⁵*Id.* at 611-12.

19 ²⁶Moreover, based on the Supreme Court’s decision in *Heimeshoff*, which held
20 that “[a]bsent a controlling statute to the contrary, a participant and a plan may agree by
21 contract to a particular limitations period, even one that starts to run before the cause of
22 action accrues, as long as the period is reasonable,” it is likely that a notice-prejudice
rule that applies to a contractually shortened limitations period would be preempted in
the ERISA context. 134 S. Ct. at 610.

23 ²⁷Doc. 17 at p. 4 n.3.

24 ²⁸*LeGras v. AETNA Life Ins. Co.*, 786 F.3d 1233, 1236 (9th Cir. 2015) (noting that courts
25 are to supplement explicit provisions and general provisions set out in ERISA with a body of
federal common law).

26 ²⁹*Chang v. Liberty Life Assurance Co. of Boston*, 247 Fed. App’x 875, 878 (9th Cir.
27 2007).

28 ³⁰*Id.*

1 **V. CONCLUSION**

2 Based on the preceding discussion, Defendants' motion at docket 11 is
3 GRANTED.

4 DATED this 14th day of October 2015.

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6 /s/ JOHN W. SEDWICK
7 SENIOR UNITED STATES DISTRICT JUDGE
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